IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

DAY, THE DAY OF MARCH
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE Mr. JUSTICE B. SUDERSHAN REDDY

and
THE HON'BLE Mr. JUSTICE C.V.RAMULU

WRIT APPEAL No.194 of 2005

(Writ Appeal under Clause 15 of the Letters Patent against the Order dated 18/01/2005 in W.P.No.21080 of 2004 on the file of the High Court)

Between:

South India Corporation (Agencies) Limited,

No.73 Armernian Street, Chennai 600 001, Rep. by General Manager (Stevedoring), L. Venkataramani, S/o. Lakshminarayanan,

aged about 44 Years,
Residing at Adayar, Chennai 600 020.

..... APPELLANT

AND

1 Andhra Pradesh Power Generation Corporation Limited

(APGENCO), Vidyut Soudha, Hyderabad,
Rep. by its Superintending Engineer/Generation-II.
2 Anand Transport, A Partnership Firm, No.9, Dr. Radhakrishnan Salai,
Chennai 600 004, Rep. by its Managing Partner.
3 M/s. South India Corporation Limited,

A Company incorporated under the provisions of the
Companies Act, 1956, having its Office at

" Rani Seethai Hal 5th Floor, 603, Anna Salai,

Chennai 600 006, Rep. by its
Director, Mr. S.P. Palaniappan,

S/o Sri Subramaniyam, aged about 47 Years.

.....RESPONDENTS

Counsel for the Appellant: Mrs. NALINI CHIDAMBARAM, Senior Counsel

AND

Mr.KATRAGADDA GOPAL CHOUDARY

Counsel for the Respondent No.1: THE ADVOCATE GENERAL

Counsel for the Respondent No.2: Mr. D.Prakash reddy, Senior Counsel

The Court made the following :

JUDGMENT : (per **C.V. RAMULU,J**)

This Writ Appeal is preferred by the writ petitioner being aggrieved by the Order of the learned single Judge made in W.P.No.21080 of 2004, dated 18-1-2005.

Two writ petitions, viz., W.P.Nos.20738 and 21080 of 2004 were disposed of by a common order dated 18-1-2005. No appeal is filed by the petitioner in W.P.No.20738 of 2004. The writ petitions were filed by M/s.Karamchand Thapar Brothers (CS) Limited and South India Corporation (Agencies) Limited seeking substantially a similar relief viz., for a declaration that the action of the 1st respondent-Corporation in accepting the Pre-Qualification Bid (PQB) of the 2nd respondent for award of transportation contract of 5 lakh Metric Tonnes of coal from Mahanadi Coal Fields Limited (MCL) on either Free On Rail Talchar (FOR) or Free On Board (FOB) Paradip Basis to the Rayalaseema Thermal Power Project (RTPP) at Muddanur as arbitrary and illegal. The petitioner in W.P.No.21080 of 2004 also sought for a direction to the 1st respondent to award the contract to him after declaring the awarding of contract in favour of the 2nd respondent as illegal.

For convenience sake, the parties are hereinafter referred to as arrayed in the writ petition. A few facts, which are relevant for the disposal of this appeal, may have to be noticed.

That on 30-7-2004 the 1st respondent issued a notification inviting tenders in two part bids for transportation of 9.00 lakh Metric Tonnes of Coal from M/s.MCL to RTPP on FOR Talchar basis or alternatively 'FOB' Paradip port basis by rail-cum-sea-cum-rail route via Paradip and Chennai. The tenders are required to be

submitted in two distinct parts. Part-I Pre-Qualification Bid and Part-II the Price Bid. However, on 26-8-2004, the 1st respondent issued an amendment to the notification dated 30-7-2004 reducing the quantity of coal to 5.00 lakh MTs. This notification also set out the eligibility criteria to be fulfilled by persons desirous of responding to the tender notification. Both the petitioner and the 2nd respondent submitted their tenders. In all, five persons including the writ petitioner and the 2nd and 3rd respondents submitted their bids within the stipulated time. The bids were opened on 25-9-2004 and the contents of the accompanying documents in the respective PQBs were read out by the Officers of the 1st respondent.

It is the case of the writ petitioner that the 2nd respondent did not qualify as per the information furnished in its PQB. It is his case that the colliery experience certificate furnished by the 2nd respondent from M/s.Kamal Wineries does not contain information as to volume, period or scope and extent of colliery experience; that the coal requirements of M/s.Kamal Wineries is of a very small quantity; that transportation is by road and that the certificate issued by M/s.India Cements Limited regarding the liasoning experience with the Collieries of the 2nd respondent is vague and does not specify the volume of work. Further, the movement of coal for M/s.India Cement Limited is substantially by road and not by rail and the requirement is only about 2.00 lakh MTs by road and a very small quantity by rail. The document issued by M/s.India Cement Limited in favour of the 2nd respondent is not a genuine one. Respondent No.2 also has not incurred rail-cum-sea-cum-rail experience with regard to the specified minimum quantity of 4 lakh MTs of coal per annum. Therefore, the 2nd respondent has not satisfied the essential conditions of the bid. Thus, the awarding of contract in favour of the 2nd respondent by the 1st respondent is arbitrary and illegal.

Respondents 1 and 2 filed separate and detailed counter affidavits denying the allegations made by the petitioner. In his counter, respondent No.1 denied the allegation that the 2nd respondent was not qualified for consideration of price bid. The certificates submitted by the 2nd respondent and issued by M/s.Kamal Wineries, Hyderabad and BELSHIPS to the effect that the 2nd respondent was their agent and has experience in chartering the matters were not taken into consideration as they were not necessary in accordance with the conditions laid down in PQB. It is also

stated that the 2nd respondent has produced 8 specific certificates issued by the Director R&P, Visakhapatnam Port Trust, by the Traffic Manager, Visakhapatnam Port Trust, by the General Manager (Ports), Poompuhar Shipping Corporation Limited, by the Visakhapatnam Steel Plant, by Jindal Vijayanagar Steel Limited, by Mormugao Port Trust and by the Chennai Port Trust. On evaluation of the certificates produced by the 2nd respondent, wherever any doubt was entertained, it requested the institutions, who issued the certificates to confirm about the issuance. Pursuant to such request, the Director (R&P), Visakhapatnam Port Trust and the General Manager (Ports), Poompuhar Shipping Corporation Limited and the General Manager (Material), India Cements Limited had confirmed through their letters dated 13-10-2004, 1-11-2004 and 1-11-2004 respectively about the genuineness of the certificates issued by them. At the time of evaluation of PQBs, the 2nd respondent and another tenderer M/s Chettinad Logistics Pvt.Ltd. did not furnish documentary evidence regarding their experience in loading of coal into ships and transportation by ships. Therefore, the 1st respondent addressed a letter to both the above tenderers to furnish documentary evidence, if any, regarding their experience in loading of coal into ships and transportation by ships. In response to this, the 2nd respondent submitted certificates regarding its experience issued by Poompuhar Shipping Corporation Limited, vide letter dated 1-11-2004. Regarding the allegation that the 2nd respondent did not qualify in the PQB as it was a sub-contractor of the petitioner, it is asserted that the fact that one of the tenderers was a sub-contractor to another does not *ipso facto* disqualify such a tenderer from being considered. From the certificates issued by the Visakhapatnam Port Trust, the 1st respondent satisfied that the entire quantities during the period from 1997 to 2001 were handled by the 2nd respondent and this fact was also confirmed by the Visakhapatnam Port Trust by its letter dated 13-10-2004. Respondent No.1 is entitled to seek information or clarification in the process of technical evaluation from the bidders, on technical issues. The price bids were opened on 10-11-2004 and the bid of the 2nd respondent was found to be the lowest and that of the writ petitioner the second lowest. The difference between the lowest and the next lowest bids when calculated for the 5.00 lakh MTs quantity comes to over Rs.8.57 crores, which is a huge amount which the 1st respondent an instrumentality of the State can ill-afford to squander. The Board of the 1st respondent at its meeting held on 6.11.2004, after thorough

consideration, decided to qualify the 2nd respondent in the PQB and accordingly the 2nd respondent's price bid was considered along with those of the other qualified tenderers.

The 2nd respondent in his counter affidavit asserted that it is qualified to tender in accordance with the eligibility criteria. The certificates issued by M/s Kamal Wineries and M/s India Cements Ltd., were part of the experience certificates issued by various parties and the 1st respondent had evaluated its PQB on an over all analysis of the certificates submitted and not merely on the basis of the above two certificates. In respect of unloading of coal from the vessels, the 2nd respondent submitted documentary proof from public sector industry M/s.Visakhapatnam Steel Plant and from private sector industry M/s.Jindal Vijayanagar Steel Limited, having handled millions of tonnes. The allegation of the petitioner that the coal was transported by road only for M/s.Kamal Wineries and for M/s.India Cements Limited and the document filed by this respondent of the above two said companies are very vague etc., was denied.

On considering the above pleadings and other material on record and after hearing both sides, the learned single Judge held as under:

A. The decision of the 1st respondent in calling upon the 2nd respondent to furnish documentary evidence of its *"coal loading into ships and transportation of coal by ships"* experience, is neither incompetent, *mala fide* nor suffers from any infirmity;

B. The 2nd respondent is not disqualified to bid for the contract on account of the fact that it was a sub-contractor of the petitioner in WP No.21080/04 in respect of the Visakhapatnam Port Trust work;

C. The satisfaction arrived at by the 1st respondent that the 2nd respondent had the rail-cum-sea-cum-rail prior experience of the specified magnitude, is valid; and

D. The 1st respondent was legitimately satisfied that the 2nd respondent had the experience in transportation of coal by ships and was thus eligible to tender.

However, the material on record in these writ petitions, considered in the light of the assertions of the 1st respondent in its counter affidavits, demonstrates no colliery liasoning experience of the 2nd respondent. As the 1st respondent states that it has not taken into consideration the Kamal Wineries Ltd., certificate furnished by the 2nd respondent, there is no other certificate either filed or pleaded that establishes the collieries liasoning experience of the 2nd respondent. How the 1st respondent was satisfied that acceptance of the PQB of the 2nd respondent serves

the overall interests of the 1st respondent, even though the 2nd respondent did not have the colliery liasoning experience, has also not been stated by the 1st respondent. Since in the considered view of this court colliery liasoning experience is an essential condition of the terms of the tender and normally binding on the 1st respondent as well, unless the 1st was satisfied that eschewing this requirement in so far as the 2nd respondent is concerned, is nevertheless compellingly to the benefit of the 1st respondent, this court is of the view that the 1st respondent should again address and specifically itself to this issue and record reasons at the level of the tender processing committee of the Board of the 1st respondent as the case may be, as to why the PQB of the 2nd respondent should be accepted.

In the 1st respondent's counter it is asserted that there was material for it to infer that the writ petitioners and the 3rd respondent (WP No. 21080/04) might have formed a cartel to jack up the rates in this contract. The petitioners on the other hand contended that the 2nd respondent did not have the colliery liasoning experience and the 1st respondent failed to adequately consider this aspect. Either or both of these factors, if true, would be prejudicial to the interests of the 1st respondent and public interest as well.

Both on the first principles as well as the tender conditions, the 1st respondent is adequately empowered to call for fresh bids, should it be satisfied that a cartel was formed or otherwise proceeding with the tender process is detrimental to its interests. It is thus not as though the 1st respondent is compelled to compromise on the qualifications or experience of the bidders including at the PQB stage, to overcome the consequences of the alleged cartelisation threat from a few of the short-listed bidders.

In any event the 1st respondent is required to rationally address itself on the colliery liasoning experience component and to record its specific decision on this aspect even within the ambience of its powers u/Clause 6 of the PQB requirements. This the 1st respondent has not done. This the 1st respondent must do as a public authority. It would subserve transparency and accountability if the present officers of the 1st respondent leave a record for succeeding administrators as to why a particular decision was taken which was at least facially not in consonance with an essential condition of the tender. Recording of reasons (however brief or succinct) contributes to the long-term interests of the 1st respondent and acts as a check on any propensity to nepotism, arbitrariness or negligence in the matter of awarding of contracts by the 1st respondent – an instrumentality of State.

This court has held hereinabove that the non-recording of reasons by the 1st respondent is in error. This conclusion is arrived at in the factual circumstances of this case. As the pre-qualification of the 2nd respondent without documentary proof of its colliery liasoning experience requires a specific satisfaction of the 1st respondent, in view of the tenor and language of clause 6 of the PQB requirements and neither any document or pleading of the 1st respondent has established such conscious and rational satisfaction of the 1st respondent, this court has directed a review and recording of reasons.

This should not be understood as laying down the principle that in all contractual situations, a public authority is required to record reasons for evaluating the bids at the PQB stage or for awarding of a contract. When challenged the public authority is however required to establish rational and fair consideration of all the bids and when there is material to infer such consideration, the requirements of administrative law are satisfied. These requirements have not however been satisfied by the 1st respondent in this case. The direction in this case is issued in the circumstances.

> Accordingly, the writ petitions are disposed of directing the 1st respondent to review the PQB bids of the 4 short-listed tenderers (who are parties in these writ petitions), record reasons for accepting the pre-qualification bids wherever any essential condition of the tender conditions (including the colliery liasoning experience condition) has not been established by any of the bidders and only thereafter proceed further in the matter of considering their price bids. The 1st respondent shall review the PQBs with the necessary expedition."

Aggrieved by the said order, this writ appeal is filed by the petitioner in W.P.No.21080 of 2004.

Smt. Nalini Chidambaram, learned counsel appearing for the appellant, contended that the 2nd respondent has not satisfied the essential conditions of the tender as required under the Notification Inviting Tenders (NIT) nor the same can be relaxed and no tenderer can be allowed to submit documents after filing of the bids to cure the tender conditions. After the last date of the bid, seeking of further documents by the authorities amounts to violation of the essential conditions of the tender and also relaxing the essential conditions in favour of a particular tenderer. The 2nd respondent was totally inexperienced in the field of transportation of coal by rail-cum-sea-cum-rail Talchar. The tender conditions impliedly required integrated experience in the transportation of coal by road, rail and sea. The 2nd respondent has no such integrated experience. In fact, on 10-11-2004, the price bids were opened and the writ petitioner on 9-11-2004 itself submitted objections as to the tenders submitted by the 2nd respondent. Pre-qualification bids cannot be for the purpose of limiting the competition. Essential conditions must be followed scrupulously and no lenience could have been taken by the 1st respondent. The certificates issued by Visakhapatnam Port trust and Poompuhar Shipping Corporation could not have been taken into consideration for the purpose of evaluating the PQBs.

Whereas, the learned Advocate General appearing for the 1st respondent submitted that under clause (6) of the tender conditions, the A.P. Genco reserved its right to assess the tenderer's capacity to perform the contract, as and when the circumstances warrant such an assessment in the overall interest of AP Genco and in that regard, the decision of the corporation is final. The 2nd respondent though produced the certificate of experience, since details were not available the same were called for. Therefore, it cannot be presumed that the 2nd respondent did not satisfy the criteria for the price bid. What all the 1st respondent did was, since

certificates of experience were available, but the said certificates do not disclose the details of the experience, details were called for. This itself does not mean that the 2nd respondent has not satisfied the essential conditions of the tender. Assuming that there is any such violation, since AP Genco has reserved its right to take a decision in the interest of AP Genco, either to accept or to reject a particular tender, the awarding of tender in favour of the 2nd respondent cannot be faulted with.

Sri D.Prakash Reddy, learned senior counsel appearing for the 2nd respondent, contended that the purported integrated experience rail-sea-road was not contemplated under clause (10) of NIT. The experience as to the magnitude was also not necessary. The colliery experience, as required under NIT, has been satisfied by the 2nd respondent. While satisfying with the experience of the 2nd respondent, 1st respondent called for further details. Thus the furnishing of the further details as required by the 1st respondent cannot be said to be curing the defect in submitting the original tender nor does it amount to granting any relaxation in favour of the 2nd respondent. Mere calling for details by the 1st respondent and furnishing of such details by the 2nd respondent cannot be said to be violative of essential conditions of tender. Learned senior counsel relied upon the Judgment reported in ***Raunaq International Ltd. v. I.V.R. Construction Ltd.*** and took us through paragraphs 26 and 27, which read as under:

> **"26.** In the present case, it was submitted that the terms and conditions of the tender specified the requisite qualifying criteria before a person could offer a tender. The criteria which were so laid down could not have been relaxed because such a relaxation results in a denial of opportunity to others. In support, the respondents relied upon *Ramana Dayaram Shetty* v. *International Airport Authority of India*[8]. In that case, the Court had held judicial review as a check on the exercise of arbitrary powers by the State and as a check on its power to grant largess. The Court also observed that when the exercise of discretion is structured in terms of the tenders which have been invited, the discretion must be exercised in accordance with the norms so laid down. The same view has been taken by this Court in *Premium Granites* v. *State of T.N.*[9] where this Court observed that where rational non-discriminatory norms have been laid down for granting of tenders, a departure from such norms can only be made on valid principles. These principles enunciated by this Court are unexceptional.
>
> **27.** In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s Raunaq International Ltd. is on valid principles looking at the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s I.V.R. Construction Ltd. who have challenged this award of tender themselves do not fulfil the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced. Even if the

> criteria can be relaxed both for M/s Raunaq International Ltd. and M/s I.V.R. Construction Ltd., it is clear that the offer of M/s Raunaq International Ltd. is lower and it is on this ground that the Board has accepted the offer of M/s Raunaq International Ltd. We fail to see how the award of tender can be stayed at the instance of a party which does not fulfil the requisite criteria itself and whose offer is higher than the offer which has been accepted. It is also obvious that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units, each of 210 MW, is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a large number of people. In the present case, there is no overwhelming public interest in stopping the project. There is no allegation whatsoever of any mala fides or collateral reasons for granting the contract to M/s Raunaq International Ltd."

He also relied upon a Judgment reported in **UNION OF INDIA v. M/S.LAXMI BUILDERS** to show that the prices quoted itself may not be a criterion and relied upon para-18, which reads as under:

> ".....Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is one of the criteria. The past record of the tenderers, the quality of the goods or services, which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded...."

He further contended that under clause (6) of the Requirements of PQB, both the criteria can be relaxed ; (1) any one among the qualified tenderers can be awarded with the tender (2) any condition can be relaxed keeping the overall public interest. We are in full agreement with the submissions made by the learned senior counsel appearing for the 2nd respondent.

We have given our earnest consideration to the respective submissions made by the learned counsel on either side and gone through the impugned Judgment and other material made available on record.

The only question that falls for consideration in this writ appeal is whether the 1st respondent committed any error in accepting the tender of the 2nd respondent and whether the 2nd respondent has violated the essential conditions of the tender making the tender submitted by him invalid ?

In this regard, we may have to notice few relevant conditions of pre-qualification bid, which read as under:

> "3. Tenders received from those not having the requisite experience (as per clause EXPERIENCE of special terms and conditions), equipment and tools and plant shall not be considered. To ensure this, the following procedure will be adopted in submission of sealed tenders.
>
> 6. Pre-qualification bid will be opened first to check whether qualification, experience and other requirements are adequate for opening of Price bid

(Part-II). Only those tenders which contain the full information and which comply with the requirements regarding technical and financial qualifications, experience and equipment will be considered. Not withstanding anything stated above the APGENCO reserves the right to assess the tenderer's capacity to perform the contract, should the circumstances warrant such assessment in the overall interest of the APEGENCO. In this regard the decision of the Corporation is final."

7. After opening, if tender is found to contain any deviation from the information furnished, the tender is liable for rejection.

8. VALIDITY OF TENDER: The tender should be kept valid for 120 days from the date of Opening of tenders.

9……..

10. EXPERIENCE:

The tender shall have previous experience of handling similar work of such large magnitude at the rate of minimum 4.00 lakhs MT of coal per annum on his own and also having experience in liasoning with collieries. IN addition to the above, tenderer shall be in possession of necessary licence from port and other authorities for stevedoring work at least at one of the ports i.e. Chennai/Paradip and the contractor should have working arrangements with listed stevedores for carrying out the remaining work, if any and tenderer shall produce solvency certificate for Rs.6.00 crores {As per annexure I(A) or I(B)}.

The tenderer shall enclose the experience certificates, performance reports and solvency certificate to the pre qualification bid (Part-I)".

12. The contractor shall furnish the following information and shall annexure to the PQB.

1. Details of coal handled at ports per annum, Port wise and year wise;
2. Infrastructure facilities available with the contractor at the ports and collieries;
3. Details of network of Offices/Establishments available at Ports, Collieries and other places.
4. Experience in handling coal – Source wise and monitoring dispatches of coal and liaison with collieries.
5. Solvency certificate from Bankers/Mandal Revenue Officer.
6. Licence from Port or competent authorities for stevedoring works at one of the Ports or both Ports.
7. Any other certificates relevant with the specification.

Clause (6) of PQB Requirements contemplates opening of PQB (Part-I) to check as to whether the qualifications, experience and other requirements are adequate for opening the Price bid (Part-II) and only those tenders, which contain the full information and which comply with the requirements regarding technical and financial qualifications, experience and equipment will be considered. However, the said clause (6) is subject to non-obstante clause added to it, wherein the 1st

respondent reserved its right to assess the tenderer's capacity to perform the contract as and when the circumstances warrant such assessment, in the overall interest of the AP Genco and in that regard, the decision of the Corporation is final. Another important clause is clause (10), which contemplates the experience of the tenderer. It stipulates that the tenderer should have previous experience of handling similar work of such large magnitude at the rate of minimum 4.00 lakh Metric Tonnes of coal per annum on his own and also having experience in liasoning with collieries, apart from possessing the requisite licence from port and other authorities. The tenderer shall enclose the experience certificate, performance report and solvency certificates PQB (Part-I). Clause 12 contemplates furnishing of certain information.

On 25-9-2004, the pre-qualification bids were opened in the presence of tenderers/their representatives. Respondent No.1 evaluated the overall experience, expertise and financial capability to execute the tender work and after scrutiny and on the whole, on being satisfied, had included the 2nd respondent as one of the qualified bidders for price bid opening. After verification of the information furnished by them regarding their experience etc., the Corporation intimated to all the tenders, who were pre-qualified, by a letter dated 8-11-2004 that the price bids would be opened on 10-11-2004 at 12.00 noon. However, in the meanwhile, various certificates produced by the tenderers were evaluated by the 1st respondent and wherever there was any doubt, they requested the concerned persons, who have issued the certificates to confirm about the issuance of the said certificates. In pursuance of the request of the 1st respondent-Corporation, Visakhapatnam Port Trust, Poompuhar Shipping Corporation and India Cements Limited confirmed through their letters dated 13-10-2004, 1-11-2004 and 1-11-2004 respectively by way of fax as to the genuineness of the certificates issued by them. In fact, it was noticed by the 1st respondent at the time of evaluation of the PQB documents that the 2nd respondent and another company, namely, M/s.Chettinad Logistics Private Limited did not furnish the documentary evidence regarding their experience in loading of coal into ship and transportation of coal by ships. Therefore, the 1st respondent was duty bound to verify and as such, addressed letters to both of them to produce documentary evidence, if any, with regard to experience in loading of coal into ships and transportation of coal by ships immediately. In pursuance of the said letters of the 1st respondent, the 2nd respondent submitted the certificate

showing about its experience in loading of coal into ships and transportation of coal by ships from Poompuhar Shipping Corporation, Tamilnadu Government Enterprise, dated 1-11-2004. Respondent No.1 also stated that it did not take into consideration the certificates submitted by the 2nd respondent and issued by M/s.Kamal Wineries, Hyderabad and M/s Bel Ships to the effect that the 2nd respondent was their agent and it has the experience in the chartering matters, since the said certificates were not necessary in accordance with the conditions laid down for PQB. Respondent No.2 has produced the following certificates in support of its experience:

i. Certificate issued by the Director (R&P), Visakhapatnam Port Trust;

ii. Certificate issued by Traffic Manager, Visakhapatnam Port Trust;

iii. Certificate issued by G.O. (Operations), Poompuhar Shipping Corporation Ltd. (A Govt.of Tamilnadu Enterprise)

iv. Certificate issued by Visakhapatnam Steel Plant.

v. Certificate issued by Jindal Vijayanagar Steel Limited.

vi. Certificate issued by Mormugao Port Trust.

vii. Certificate issued by Chennai Port Trust.

As stated above, as and when there was doubt, the 1st respondent requested the concerned persons, who issued the certificates, to confirm about the issuance of such certificates. Pursuant to that, as noticed above, the Visakhapatnam Port Trust, Poompuhar Shipping Corporation and India Cement Limited confirmed as to the experience of the 2nd respondent through their letters. It is not that such letters were addressed only to the 2nd respondent. In fact, wherever the 1st respondent found some doubt as the genuineness of the certificates and details of the certificates, such letters were addressed to all the tenderers and also to the institutions, which had issued the said certificates supporting the claim of the tenderers. Therefore, it cannot be said that the 1st respondent has given a go-bye to any of the essential conditions of Pre-Qualification Bid Requirements or even if the same is said to be a relaxation, the same was extended to one and all. The discretion vouchsafed to the 1st respondent in clause (6) of PQB requirements of the tender specification to eschew all or any of the preceding conditions in the PQB requirements, is not an

uncanalized discretion. The discretion, occurred in the tender conditions, is a discretion conferred on a public authority and such discretion is intended to sub-serve a compelling State and public interest. In our opinion, the 2nd respondent has satisfied the PQB Requirements, since he had produced those two certificates issued by Visakhapatnam Port Trust and Poompuhar Shipping Corporation at the time of submitting PQB etc. What all the 1st respondent did was, while evaluating the tenders of all the tenderers, for the purpose of opening price bid, wherever he entertained some doubt as to the genuineness, the details were called for from all the tenderers. Therefore, the discretion vested in him under clause (6) was also extended to all equally. Hence, it cannot be said that any of the essential conditions of PQB were violated by the 2nd respondent as contended by the writ petitioner-appellant. PQBs were opened in the presence of all the tenderers/their representatives and the contents of the documents were read out for the information of all the tenderers present. Writ petitioner as well as the 2nd respondent were enlisted as qualified bidders. The expert body satisfied with the pre-qualification bid of the 2nd respondent and such satisfaction is conclusive. In a given case even the price offered may also one of the considerations for the purpose of finalizing the tenders. In fact, obviously there was a difference of Rs.8.57 crores, which works out to 18% compared to that of the offer made by the second lowest tenderer i.e. the writ petitioner. In fact, the 1st respondent has given all the details as to how it was satisfied and what are the verifications it had made as to the certificates produced by the 2nd respondent and the details furnished by various organizations from whom the verification was made. In our opinion, no essential conditions of PQB were violated. The acceptance of the pre-qualification bid of the 2nd respondent cannot be said to be bad. Further, the writ petitioner-appellant also did not make any complaint as to the verification of the certificates by the 1st respondent and furnishing of information by various organizations with regard to the certificates produced by the 2nd respondent and the particulars furnished therein till the letter dated 8-11-2004 was received intimating as to the opening of the price bid on 10-11-2004 at 12.00 noon. On 9-11-2004, the writ petitioner made some vague objection stating that the 2nd respondent does not satisfy the requirements of PQB, which in our opinion, is not correct for the reasons furnished supra. Further, the 2nd respondent was also not required to have an integrated experience of rail-cum-sea-rail etc. In fact, all these

things are satisfied through the certificates and the further clarification issued by Visakhapatnam Port Trust, India Cement Limited and Poompuhar Shipping Corporation.

Further, it may be apt to note that the difference between the lowest tenderer – 2nd respondent and the next lowest bid when calculated for 5.00 lakh MTs quantity comes to over Rs.8.57 crores, which is a huge amount and almost comes to 18% less than the amount tendered by the writ petitioner. Thus, no public interest suffered in awarding the tender in favour of the 2nd respondent. Further, no *mala fides* or malice or favouritism has been attributed in this case.

We are of the considered opinion that none of the essential conditions were violated by the 1st respondent while making the 2nd respondent to qualify such PQB along with others. However, since the 2nd respondent did not challenge the order of the learned single Judge, we cannot disturb the findings in the writ petitioner. Further, in view of the conclusions reached by us, there is no necessity to go into the aspect as urged by Sri D.Prakash Reddy, learned senior counsel appearing for the 2nd respondent that even otherwise the 1st respondent is clothed with the right to assess the tenderer's capacity to perform the contract as and when circumstances war5rant such assessement in the overall interest of the A.P. Genco.

For all the above reasons, the writ appeal fails and as such, it is dismissed confirming the Order passed in W.P.No.21080 of 2004, dated 18-1-2005. No order as to costs.

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B.Sudershan Reddy, J

30-3-2005

_____

C.V.Ramulu, J

Prk

DEPUTY REGISTRAR

/TRUE COPY/

SECTION OFFICER.

To

1 The Superintending Engineer/Generation-II, Andhra Pradesh

Power Generation Corporation Limited

(APGENCO), Vidyut Soudha, Hyderabad,
2 The Managing Partner, Anand Transport, A Partnership Firm,

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3 Mr. S.P. Palaniappan,

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